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) Case No. 2:20-cv-00028-BMM
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PLAINTIFFS' PROPOSED
)
SUPPLEMENTAL JURY
)
INSTRUCTIONS

INSTRUCTION NO. ____
Pollutant

Treated sewage in the holding ponds is a pollutant.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					
Authority:	33 U.S.C. § 1362(6)				

INSTRUCTION NO. ____
Pollutant

Nitrogen in the treated sewage is a pollutant.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					
Authority:	Doc. 111 at 2, ¶5; Doc. 121 at 14.				

INSTRUCTION NO. ____
Point Source

The wastewater holding ponds are a “point source” if they leak any pollutants.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					
Authority:	Doc. 121 at 21.				

INSTRUCTION NO. ____
The Test for Functional Equivalence

You must determine whether the Plaintiffs have proved that leakage from the District's storage ponds is the "functional equivalent of a direct discharge" of a pollutant to the West Fork.

To determine whether the Plaintiffs have proved that there is the functional equivalent of a direct discharge in this case, you should consider these factors and can give more or less weight to any factor:

- (1) The time it takes the pollutant to reach the West Fork
- (2) The distance the pollutant must travel to reach the West Fork
- (3) The nature of the material through which the pollutant travels
- (4) The extent to which the pollutant is diluted or chemically changed as it travels
- (5) The amount of pollutant entering the West Fork relative to the amount of the pollutant at the source
- (6) The manner by or area in which the pollutant enters the West Fork
- (7) The degree to which the pollution has maintained its specific identity where it enters the West Fork
- (8) The condition of the facility from which the pollutant originates, including any ripped liners, any scheduled repairs, and the underdrain pipe.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					
Authority:	Doc. 121 at 11; <i>Cty. of Maui v. Haw. Wildlife Fund</i> , 140 S. Ct. 1462, 1476-77 (2020).				

INSTRUCTION NO. ____
“Any Pollutant”

The Clean Water Act prohibits the discharge of “any pollutant” without a permit. If you determine that “any pollutants” are leaking from the holding ponds and being discharged from the underdrain pipe to the West Fork as the “functional equivalent” of a direct discharge, the District has violated the Clean Water Act.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court’s Motion	
Refused					
Withdrawn					
Authority:	Doc. 121 at 22-23; 33 U.S.C. § 1370.				

INSTRUCTION NO. ____
“Strict Liability”

The Clean Water Act is a law that imposes strict liability. That means you do not consider whether the District purposefully intended for any pollutant to enter the West Fork of the Gallatin River. The District has violated the Clean Water Act if you find it is discharged the functional equivalent of a direct discharge of any pollutant to the West Fork, regardless of whether it meant to or not.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court’s Motion	
Refused					
Withdrawn					
Authority:	<i>Sierra Club v. Union Oil Co. of Cal.</i> , 813 F.2d 1480, 1490–91 (9th Cir. 1987); <i>Haw. Wildlife Fund v. County of Maui</i> , 886 F.3d 737, 745 n.1 (9th Cir. 2018) (collecting cases) (vacated on other grounds).				

INSTRUCTION NO. ____
“Discharge” of a Pollutant—Other Sources

The District has violated the Clean Water Act if you determine it has discharged the functional equivalent of a direct discharge of any pollutant to the West Fork, regardless of whether pollutants from other persons are also being discharged from the underdrain pipe.

Requested by Plaintiff	X	Requested by Defendant			
Given as Requested		Given as Modified		Given on Court's Motion	
Refused					
Withdrawn					
Authority:	<i>NRDC v City of Los Angeles</i> , 673 F.3d 880, 900 (9th Cir. 2011) "The Clean Water Act does not distinguish between those who add and those who convey what is added by others. The act is indifferent to the originator of water pollution."				

/s/ John Meyer
 JOHN MEYER

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2022, a true and correct copy of the foregoing **PLAINTIFFS’ PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS** was filed and served via ECF on the following parties:

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